

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARCIA SAMPLES</b>	)	
Claimant	)	
VS.	)	
	)	
<b>CITY OF GLASCO</b>	)	Docket No. 265,499
Respondent	)	
AND	)	
	)	
<b>KANSAS MUNICIPAL INSURANCE TRUST</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant and respondent appeal the February 21, 2011, Post-Award Medical Award of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was denied medical treatment for her left shoulder after the ALJ determined that claimant's description of the accident was not credible. Claimant gave more than one description of how she fell on February 24, 2010, while she was pulling bales of hay off a stack in order to feed her horses. The ALJ did award claimant's attorney fees and expenses pursuant to K.S.A. 44-536(g). This matter was placed on the Appeals Board's summary calendar for determination without oral argument.

Claimant appeared by her attorney, Scott J. Mann of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Post Award Medical Hearing held August 5, 2010, with exhibits; the deposition of Steve R. Peloquin, M.D., taken December 8, 2010, with exhibits; and the documents filed of record in this matter. The Board has further considered the following record: the deposition of claimant taken on August 7, 2002; the transcript of Preliminary Hearing held July 23, 2003, with exhibits; the transcript of Motion Hearing held April 9, 2003; the transcript of Settlement Hearing held December 23, 2003, with exhibits; the transcript of Post Award Hearing held April 15, 2005; the deposition of Jon C. Parks, M.D., taken on May 11, 2005, with exhibits; the transcript of Post Award Medical and Motion on Attorney Fees Hearing

held August 14, 2007; the deposition of Steve R. Peloquin, M.D., taken on September 27, 2007, with exhibits; the transcript of Post Award Hearing from March 7, 2008, with exhibits; the transcript of Review & Modification Hearing from January 28, 2010, with exhibits; and the deposition of Steve R. Peloquin, M.D., taken on February 10, 2010, with exhibits.

### **ISSUES**

1. Claimant appealed the issue of whether claimant's left shoulder injury suffered on February 24, 2010, was a natural and direct result of her work-related left knee injury. Claimant contends that her left knee, originally injured on February 17, 1999, locked up on her on the date of accident, causing the hay bale that she was standing on to roll, causing claimant to fall on her left shoulder. Respondent contends, as was determined by the ALJ, that claimant's description of the accident varied at times, raising a question as to claimant's credibility. Respondent argues that the denial of benefits should be affirmed.
2. Should claimant's counsel be awarded post-award medical attorney fees pursuant to K.S.A. 2009 Supp. 44-510k(b) and K.S.A. 44-536(g)? Respondent argues that the statute does not make it mandatory to award attorney fees post award. In this instance, respondent alleges that the claim by claimant was not made in "good faith" and should not be rewarded. Claimant contends the dispute regarding the injury to her left shoulder was brought in good faith and claimant should be provided medical treatment. Thus, the request, brought in good faith, should allow for attorney fees pursuant to the statutes.

### **FINDINGS OF FACT**

After reviewing the record compiled to date, the Board concludes the Post-Award Medical Award should be affirmed.

The history of this incident is well set out in the Post-Award Medical Award of the ALJ. The Board adopts the Findings of Fact set out therein as its own.

Claimant contends that her previously injured left knee locked up on her as she was moving hay bales for her own horses. This caused the bale below claimant's left foot to roll, and claimant fell, landing on her left shoulder. As noted in the Award, claimant has given various descriptions of the incident and how and why she fell. However, the description of claimant standing with her weight almost totally on her right leg, while her left leg remained on a higher bale, is difficult to picture. As noted by the ALJ, if claimant's left knee locked in a flexed position, the bale under that foot would not roll. Additionally, claimant was in the process of pulling a bale down with her left hand. This bale was higher than the bale on which claimant's left foot rested. A more understandable scenario would be that the bale claimant was pulling on struck the bale she was standing on as claimant

pulled it down. This would cause the lower bale to move, causing claimant to fall. Claimant ultimately testified on cross-examination that she was not sure why she fell.

There is also a problem with claimant's description of the resulting injury. At first she testified that it was so severe that she laid on the ground for 20 to 30 minutes, in the cold and snow. She then testified that the injury was so minor that she did not seek medical treatment until her scheduled appointment with board certified anesthesiologist and pain management specialist Steve R. Peloquin, M.D., claimant's pain management treating physician, on March 11, 2010. It is disturbing that the treatment notes of Dr. Peloquin from the March 11 and April 8, 2010, visits fail to mention the left shoulder. Dr. Peloquin attempts to explain this by stating that he was not authorized to treat the left shoulder and, thus, did not mention it in his treatment notes. That 20-20 hindsight explanation rings hollow.

A recent complaint from claimant was that she had contracted hepatitis C from the injections received during her knee surgeries after the February 17, 1999, accident. Dr. Peloquin verified that hepatitis C can remain undetected in the body for years. He initially determined that claimant probably contracted the disease during the knee surgeries. However, when it was pointed out that claimant had not received blood transfusions during those surgeries and that blood was regularly tested for hepatitis C after 1992, a question was raised regarding claimant's contamination. When it was further pointed out that claimant had failed to mention anything to Dr. Peloquin about the surgery in the 1970s for a kidney stone, during which she did receive blood transfusions, Dr. Peloquin changed his opinion, determining that it was more probable that claimant was exposed to the disease during that surgery.

This claimant has been in front of this ALJ no less than seven times for various reasons. By now it would appear that this ALJ would know this claimant. He should certainly be able to ascertain the credibility of this claimant's testimony.

Claimant's attorney submitted a time sheet displaying the time rendered in the pursuit of claimant's medical treatment for her left shoulder. This time sheet with the required affidavit was considered and adopted by the ALJ in awarding claimant's attorney fees in the amount of \$3,450.00, based upon an hourly rate of \$150.00 and with 23 hours expended.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

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<sup>1</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

Whether an injury is a natural and probable result of previous injuries is generally a fact question.<sup>4</sup>

When a primary injury under the Worker's [sic] Compensation Act is shown to have arisen out of and the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.<sup>5</sup>

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.<sup>6</sup>

Normally, an accident caused by a prior injury would render any new injury compensable. However, here, the ALJ found that claimant's description of the accident to not be credible. As noted above, this claimant has appeared before this ALJ at least seven times. The ALJ's determination that claimant's description of this accident was not credible carries some weight with the Board. The Board has, in the past, given some deference to the determination by an administrative law judge on the credibility of witnesses who testify before that administrative law judge.<sup>7</sup> The Board is not required to do this. Respondent's contention that the Board "must" give such deference is incorrect. The Board's review is de novo on the record presented to and considered by the

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<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>4</sup> *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 1, 128 P.3d 430 (2006).

<sup>5</sup> *Id.* at Syl. ¶ 2.

<sup>6</sup> *Id.* at Syl. ¶ 3.

<sup>7</sup> *Prince v. Industrial Truck & Trailer Refinishing*, No. 1,051,076, 2011 WL 1747852 (Kan. WCAB April 25, 2011); *Wood v. Medicalodges, Inc.*, No. 1,051,863, 2011 WL 1747859 (Kan. WCAB April 7, 2011).

administrative law judge. However, the Board has the jurisdiction and authority to modify the award as it deems necessary.<sup>8</sup>

In this instance, the description of the accident provided by this claimant does not ring true. The Board finds that claimant has failed to prove that her accident on February 24, 2010, was the result of her left knee locking, but, rather, her accident was more likely from problems associated with claimant pulling a bale of hay from the top of the stack onto the bale that claimant was using to support her left leg. The denial of benefits in this matter is affirmed.

The Board must next consider respondent's objection to the award of attorney fees in this matter. Respondent contends that this claim was not brought in good faith and that the lack of credibility on claimant's part should allow for a denial of attorney fees.

K.S.A. 44-536(g) states:

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

As noted in the statute, the award of attorney fees in this instance is not mandatory. The ALJ, nevertheless, determined that fees were appropriate in this instance. This claimant has, in the past, brought less credible claims. To attempt to receive medical treatment for the contraction of hepatitis C while omitting pertinent information from the treating physician would justify a denial of fees for claimant's attorney. But, here, the dispute appears legitimate. Claimant suffered an injury which she contended was the

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<sup>8</sup> K.S.A. 2010 Supp. 44-551(i); K.S.A.2010 Supp. 44-555c.

direct result of her original left knee injury. While the ALJ and the Board question claimant's credibility, the attorney fully represented his client's interest in this litigation, as is his duty. To do anything less would be a disservice to his client.

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.<sup>9</sup>

The allowance of post-award attorney fees in this instance is affirmed.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Post-Award Medical Award of the ALJ should be affirmed. Claimant has failed to prove that the accident on February 24, 2010, was the result of the original left knee injury suffered on February 17, 1999. The determination by the ALJ that attorney fees are appropriate in this instance is affirmed.

The Post-Award Medical Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Post-Award Medical Award of Administrative Law Judge Bruce E. Moore dated February 21, 2011, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>9</sup> Timothy J. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

Dated this \_\_\_\_ day of June, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge